United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 23146

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AIRCRAFT OWNERS AND PILOTS ASSOCIATION
J. B. HARTRANFT, JR.,
MAX KARANT,
FRANK K. SMITH,
WALTER HELMER,
STANLEY J. LYNN,
MERRITT WHITE,

On behalf of themselves and all others similarly situated

Appellants

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION
U. S. DEPARTMENT OF TRANSPORTATION,

and

JOHN H. SHAFFER, ADMINISTRATOR
FEDERAL AVIATION ADMINISTRATION

Appellees

BRIEF FOR APPELLANTS

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STATEMENT OF ISSUES

I. Whether the District Court erred in granting summary judgment to the appellees in that there are genuine issues of material fact to be litigated in this case.

II. Whether the District Court erred in granting summary judgment to the appellees in that the case raises extremely important and complex issues involving the grant of exclusive and priority use of the navigable airspace and federally funded public facilities to one class of user to the detriment of another class of user.

This case was not previously before this Court; but the case of National Business Aircraft Association, Inc. v. Volpe, et al., No. 22636 (April 22, 1969), which was previously before this Court also sought judicial review of the Federal Aviation Regulation here involved.

REFERENCES TO RULINGS

On May 14, 1969, Judge Gerhard A. Gesell of the District Court, after argument by the parties (J.A. 112-65), granted summary judgment to the Government, denied the Government's motion to dismiss, and dismissed the plaintiffs' motion for preliminary injunction as moot. The oral remarks of Judge Gesell (J.A. 165-71) constitute the findings of fact and conclusions of law in support of the summary judgment.

STATEMENT OF THE CASE

This is an appeal from the grant of summary judgment by the United States District Court for the District of Columbia in an action involving judicial review of a rule promulgated by the Acting Administrator of the Federal Aviation Administration. The rule became effective on June 1, 1969, and is scheduled to expire on December 31, 1969.

On April 22, 1969, plaintiffs filed a COMPLAINT (J.A. 5-14) in the United States District Court for the District of Columbia, seeking injunctive relief and declaratory judgment against appellees (hereinafter "the Government"). The plaintiffs are six individual owners and pilots of general aviation aircraft and an association comprised of over 150,000 aircraft owners and pilots, who sue on behalf of themselves and the class of over one-half million general aviation aircraft owners and pilots adversely affected and aggrieved by the rule in question. The suit names the present Administrator of the Federal Aviation Administration and his superior, the present Secretary of the Department of Transportation of the United States.

Plaintiffs allege in their COMPLAINT that the rule will unlawfully and unconstitutionally grant exclusive use and

priority use of five major airports of the United States, attendant air navigation facilities, and adjacent airspace, to air carriers and scheduled air taxis to the detriment of general aviation aircraft owners and pilots.

At the time of the filing of the COMPLAINT plaintiffs moved for a preliminary injunction enjoining the Government from implementing the challenged rule pending final hearing and determination of the action (J.A. 15-31). On April 28, 1969, the Government moved the District Court for dismissal of the action or in the alternative for summary judgment on the ground that the COMPLAINT fails to state a claim upon which relief can be granted (J.A. 33-90). On May 14, 1969, Judge Gerhard A. Gesell of the District Court, after argument by the parties (J.A. 112-65), granted summary judgment to the Government, denied the Government's motion to dismiss, and dismissed the plaintiffs' motion for preliminary injunction as moot. Summary judgment was granted to the Government before it answered the COMPLAINT or responded to the interrogatories and requests for admissions filed by plaintiffs. The oral remarks of Judge Gesell (J.A. 165-71) constitute the findings of fact and conclusions of law in support of the summary judgment. The instant appeal is

taken from the grant of summary judgment to the Government.

A proper statement of the case requires an identification of the general aviation segment of the aviation community.

General aviation is all civil aviation except air carriers. Although general aviation is usually treated as a single segment of aviation, it actually encompasses several types of flying including: personal, executive, business, aerial application, instructional, air taxi, and industrial. According to the Federal Aviation Administration Statistical Handbook of Aviation, 1968 edition, general aviation is comprised of 114,186 active aircraft (as compared with 2,452 aircraft operated by the air carriers), flown by more than one-half million general aviation owners and/or pilots (as compared with less than 25,000 pilots employed by the air carriers), which in 1967 flew more than 22.2 million hours and 3.4 billion miles (as compared with 6 million hours flown by air carriers), which consumed 60% of all aviation gasoline consumed and 58% of all aviation oil consumed, which accounted for 75% of all landings and takeoffs at controlled airports in the United States and 90% of all Visual Flight Rules operations and which serve all 10,126 civil airports

in the United States (as compared with 826 airports served by the air carriers (J.A. 18). According to the study, Magnitude and Economic Impact of General Aviation 1967-1980, prepared for the Utility Airplane Council of the Aerospace Industries Association by R. Dixon Speas Associates, general aviation business flying alone, which accounts for approximately one-third of all general aviation flying, amounted to 8,483,000 hours in 1967 and is forecast to increase to more than 20 million hours by 1980 (J.A. 18-19). General aviation activities in 1967 accounted for $2.2 billion of the total U.S. Gross National Product and by 1980 this amount is forecast to reach $7.1 billion for an increase of 222.7%. In 1967, the three cities in which are located the five "High Density Traffic Airports" ranked second, third, and sixth in the number of general aviation aircraft located there and are forecast to be ranked second, third, and fifth by 1980 (J.A. 18-19).

Prior to the effective date of the challenged rule, the national airspace system had accommodated all users on a first-come-first-served basis. The concept of first-come-first-served has always (except for emergency and national defense reasons) prevailed as a fundamental policy governing

the use of airspace and public airports (J.A. 22). An air carrier aircraft was accorded the same treatment as a general aviation aircraft or a military aircraft; no class was granted priority over the other. Then, in rulemaking, the Federal Aviation Administration determined that air traffic delays in certain major air terminal areas are unreasonable and that as a short-range solution to these delays, procedures must be adopted which abrogate first-come-first-served and grant priority use to common carriers over private and other operators. While, according to the Acting Administrator, "the concept of 'first-come-first-served' remains as the fundamental policy governing the use of airspace," the concept is modified to apply only "so long as capacity is adequate to meet the demands of all users without unreasonable delay or inconvenience" (J.A. 38).

These procedures were first proposed on September 3, 1968, (J.A. 34-36), modified and issued as a rule on November 27, 1968 (J.A. 37-39), and again modified and issued as a rule on February 24, 1969 (J.A. 13-14).

As required by the Administrative Procedure Act, 5 U.S.C. §553, the Acting Administrator afforded interested persons the opportunity to submit written comments. This produced

the largest volume of comments ever received on any proposed aviation rule, consisting of seventeen bound volumes which contain 3,051 letters and comments from the aviation community and the general public. Of these, 3,983 voiced opposition to the proposed rule, and 68 favored it (J.A. 98-103).

The FAA conducted a public hearing on the proposal on September 25 and 26, and October 3, 1968. This hearing was an opportunity for all concerned to present their views of the proposal orally. It was not a judicial or evidentiary type hearing (J.A. 34). The views expressed were virtually the same as those submitted in written comments.

The plaintiff Aircraft Owners and Pilots Association on behalf of its 150,000 members, participated throughout in the rulemaking proceeding. It appeared and testified, through one of its officers, at the public hearing conducted by the FAA on the proposal. It submitted written comments on the proposal. It petitioned for revocation of the rule as first modified; and it petitioned for reconsideration of the rule as it is presently promulgated.

The substance of the challenged rule is that in order to operate in or out of John F. Kennedy, LaGuardia, Newark, O'Hare, or Washington National Airports (designated high

density traffic airports), an aircraft operator must have an arrival or departure reservation issued by Air Traffic Control (ATC) and must have filed an instrument flight rules (IFR) or a visual flight rules (VFR) flight plan for that operation. Each of these airports is limited to a specified number of hourly IFR operations allocated to three classes of users in order of the following priorities: "Air carriers except air taxis," "Scheduled air taxis," and "Other." "Other" includes the plaintiffs, who are owners and pilots of general aviation aircraft. Also included within this third class are airline training flights, the Federal Aviation Administration's own fleet, unscheduled air taxis, military, Coast Guard, and miscellaneous other users.

The following table sets forth the hourly number of IFR operations.

IFR OPERATIONS PER HOUR

Class of User	John F. Kennedy Airport	LaGuardia Airport	Newark Airport	O'Hare Airport	Washington National Airport
Air carriers except air taxis	70*	48	40	115	40
Scheduled air taxis	5	6	10	10	8
Other	5	6	10	10	12

*80 from 5 P.M. to 8 P.M.

The allocations of reservations among the several classes of users do not apply from 12 Midnight to 6 A.M. local time, but the total hourly limitation remains applicable.

There are two exceptions to the reservation limitation which are expressly to serve the common carrier. Extra sections of scheduled air carrier flights may be conducted without regard to the reservation limitation at any of the airports except Kennedy. Charter flights, or other non-scheduled flights of scheduled or supplemental air carriers may be conducted without regard to the reservation limitation at Washington National Airport.

There are two further exceptions permitting operations additional to those allocated. One is that ATC may grant a reservation to an IFR or VFR aircraft if "the aircraft may be accommodated without significant additional delay." The other, principally to accommodate STOL, VTOL, and helicopter operations, is that ATC and the airport management may enter into a letter of agreement with an aircraft operator permitting IFR and VFR operations without reservation if the operation is conducted "without interference to any other aircraft operation."

The rule has serious adverse impact on general aviation. It has set the precedent that air carrier aircraft may be

granted priority over general aviation aircraft in the use of federally funded public facilities "where capacity limitations compel a choice." It is alleged to have the effect of driving general aviation away from the five designated airports. While the rule applies only to five airports and is scheduled to expire at the end of this year, the Government has already suggested that it may be necessary to extend the rule beyond its present expiration date, and that it may be necessary to apply it to airports in addition to the original five. Plaintiffs have alleged in detail how they feel this rule is unlawful (J.A. 5-14) but because of the grant of summary judgment to the Government have not yet had the opportunity to prove their allegations.

ARGUMENT

I

THERE ARE GENUINE ISSUES OF MATERIAL FACT TO BE LITIGATED IN THIS ACTION AND THEREFORE SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED

The District Court erred in granting summary judgment to the Government. Summary judgment is appropriate only if there "is no genuine issue as any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). As stated in the leading case in this jurisdiction on summary judgment, Dewey v. Clark, 86 App. D.C. 157, 163, 180 F.2d 766, 772 (1950): "Factual issues are not to be tried or resolved by summary judgment procedure; only the existance of a genuine issue and a material factual issue is to be determined."

There are genuine issues of material fact to be litigated in this action, which are set out below. It will be apparent from a reading of these issues that the issues are complex. It is difficult to place these issues in the proper

perspective without a full understanding of the operation of our national airspace system and how this rule, with particular application to general aviation, affects this operation. In large measure, these are matters of expert testimony which are generalized in plaintiffs' affidavits, and which require a full range of oral examination for proper development.

There is a genuine issue as to whether the rule is in excess of the statutory authority of the Government to promulgate, as is alleged by the plaintiffs in Paragraph 8 of the COMPLAINT (J.A. 8-9). Though the Government has not answered the COMPLAINT, it denies this allegation in its STATEMENT OF MATERIAL FACTS (J.A. 91) and claims that 49 U.S.C. §1348(a) which authorizes the Administrator to "assign by rule...the use of navigable airspace...to insure the efficient utilization of such airspace...." constitutes authorization to promulgate the challenged rule. In the AFFIDAVIT OF DAVID D. THOMAS, the affiant states that as Acting Administrator he determined that the rule would lead to more efficient utilization of navigable airspace (J.A. 43). Plaintiffs' STATEMENT OF GENUINE ISSUES states, however, that "the rule will not lead to more efficient utilization of

navigable airspace." (J.A. 95). This is supported by ROYS C. JONES, an acknowledged air traffic control expert, who states that "this rule is not necessary for the relief of delays at the designated terminals, nor would it, if implemented, provide such relief" (J.A. 22). If the rule will not accomplish more efficient utilization of the navigable airspace, the claimed authority does not exist.

There is a genuine issue of fact whether the rule is in violation of section 308(a) of the Federal Aviation Act, 49 U.S.C. §1349(a). This section provides in pertinent part that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." Plaintiffs allege in Paragraph 7 of the COMPLAINT that "the effect of the aforesaid rule will be to grant exclusive use...of five major airports of the United States, attendant air navigation facilities, and adjacent airspace, to air carriers and scheduled air taxis to the detriment of general aviation aircraft owners and pilots" (J.A. 8) and in Paragraph 8(d) that the rule is unlawful in that "it in effect grants exclusive rights for the use of landing areas and navigation facilities upon which Federal funds have been expended, in violation

of section 308(a) of the Federal Aviation Act of 1958, 49 U.S.C. §1349(a)" (J.A. 9). The Government does not address itself to this allegation in its STATEMENT OF MATERIAL FACTS, but does deny it in Paragraph 19 of the AFFIDAVIT OF DAVID D. THOMAS (J.A. 46). Plaintiffs' STATEMENT OF GENUINE ISSUES recites this as an issue (J.A. 94). In support thereof, the AFFIDAVIT OF J. B. HARTRANFT, JR., states that he and other general aviation aircraft owners and pilots must discontinue or restrict their use of these airports as transients and will probably have to discontinue basing their aircraft at the five airports (J.A. 19-20). This will have the effect of granting exclusive use to the air carriers and scheduled air taxis.

There is a genuine issue, as alleged in Paragraph 9(a) of the COMPLAINT, whether the defendant Administrator and his predecessor, the Acting Administrator, abused their discretion and acted arbitrarily and capriciously in the promulgation of this rule and in their refusal to reconsider and revoke the rule in that the rule is not reasonably related to and will not achieve the objective sought to be accomplished, viz., relieve excessive delays at the five major airports (J.A. 10). This allegation is supported by the

AFFIDAVIT OF ROYS C. JONES (J.A. 22) and disputed by the AFFIDAVIT OF DAVID D. THOMAS (J.A. 48). Hence, while the Government contends that the rule will relieve excessive delays, even to the benefit of general aviation (J.A. 44), plaintiffs maintain that the rule will not achieve its desired end and will seriously damage the general aviation community (J.A. 19-20, 25, 105, 107-08).

There is a genuine issue of fact in the allegation of Paragraph 9(b) of the COMPLAINT, that the defendant Administrator and his predecessor, the Acting Administrator, abused their discretion and acted arbitrarily and capriciously in the promulgation of the aforesaid rule and in their refusal to reconsider and revoke the rule in that the rule was promulgated in the face of an official record of overwhelming opposition of the aviation community and others communicated to the defendant Administrator and his predecessor, the Acting Administrator, in the rulemaking proceeding (J.A. 10). The AFFIDAVIT OF RUSSELL SAMUEL ROSENBERGER, JR., shows that the comment received by the agency is the largest volume of comments ever received by the Federal Aviation Administration on any proposed rule; that it came from informed and expert commentators; and that of a total of 3,051 letters received

only 68 were in favor of the rule. Those opposed numbered 2,953 (J.A. 98). The Government's STATEMENT OF MATERIAL FACTS does not address itself to this allegation.

There is a genuine issue as alleged in Paragraph 9(c) of the COMPLAINT with respect to whether the defendant Administrator and his predecessor, the Acting Administrator, abused their discretion and acted arbitrarily and capriciously in the promulgation of the rule in that, without adequate justification, the rule abrogates the long-standing federal policy of accommodating all aeronautical users of the Nation's airports and airspace on a "first-come-first-served" basis (J.A. 10). The affidavits of plaintiffs air traffic control experts state as a fact that "first-come-first-served" has been the long-standing federal policy governing airspace use and that this policy will be abrogated by the rule (J.A. 22, 30). The Government does not deny this allegation in its STATEMENT OF MATERIAL FACTS, but Paragraph 19(b) of the AFFIDAVIT OF DAVID D. THOMAS seems to dispute this by saying: "the 'first-come-first-served' concept will be unaffected in the sense that aircraft seeking air traffic services will receive them, on a 'first-come-first-served' basis, subject only to the advance reservation requirements

of the rule" (J.A. 46-7). Plaintiffs maintain there is no adequate justification for abrogating the long-standing "first-come-first-served" policy. For as plaintiffs point out in their STATEMENT OF GENUINE ISSUES, general aviation is not a prime cause of the "excessive delays" which the rule is intended to cure; a prime cause of the "excessive delays" is simultaneous scheduling by the air carriers and scheduled air taxis; and yet general aviation aircraft owners and operators will be irreparably injured if the rule is implemented (J.A. 95).

There is a genuine issue whether the rule arbitrarily and unreasonably discriminates against general aviation owners and pilots in violation of the due process clause of the Fifth Amendment to the Constitution of the United States as alleged in Paragraph 10 of the COMPLAINT (J.A. 10). In the AFFIDAVIT OF DAVID D. THOMAS, the Government asserts as a statistical fact that the proportionate utilization by general aviation at the subject airports will not be substantially different after implementation of the rule (J.A. 43). PLAINTIFFS STATEMENT OF GENUINE ISSUES, on the other hand, states that "the proportionate utilization of the high density traffic airports by general aviation

will be less after implementation of the rule than exists prior to the implementation of the rule" (J.A. 95). Plaintiffs' judgment is supported by the study of air traffic control expert, Francis M. McDermott (J.A. 107-8).

There are other genuine issues raised in the case, many of which overlap or are subsidiary to those set out above.

II

THERE ARE IMPORTANT AND COMPLEX QUESTIONS PRESENTED IN THIS ACTION AND THEREFORE SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

As already suggested, this case raises extremely important questions and complex issues. It involves the legality and constitutionality of granting exclusive use and priority use of our navigable airspace and federally funded public facilities to air carriers to the detriment of general aviation.

Where, as here, such important issues are presented, disposition by summary judgment is inappropriate. As was

stated in Kennedy v. Silas Mason Co., 334 U.S. 249, 256-57 (1948), "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice," accord, Builder's Corporation of America v. United States, 259 F.2d 766 (9th Cir. 1958). This is especially so where constitutional issues, as here, are involved, Pacific American Fisheries v. Mullaney, 191 F.2d 137 (9th Cir. 1951). Summary judgment is not generally suitable in cases involving complex factual issues, Anthony Grace & Sons, Inc. v. United States, 345 F.2d 808 (Ct. Cl. 1965); or in cases where the factual area is particularly technical, Columbia Broadcasting System, Inc. v. Teleprompter Corp., 251 F.Supp. 302 (S.D. N.Y. 1965).

CONCLUSION

For the reasons stated, plaintiff-appellants respectfully pray that the grant of summary judgment to the Government be reversed and that the case be remanded to the United States District Court for the District of Columbia for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John S. Yodice, attorney for the appellants in the above-entitled cause, hereby certify that on the 22d day of July, 1969, I served two copies of the foregoing BRIEF FOR APPELLANTS upon Morton Hollander, Chief, Appellate Section, and Leonard Schaitman, United States Department of Justice, Washington, D.C., Attorneys for Appellees, by delivering copies thereof to a clerk or other responsible person in their office.

JOHN S. YODICE

No. 23,146

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

AIRCRAFT OWNERS AND PILOTS
ASSOCIATION, ET AL.,

Plaintiffs-Appellants

v.

JOHN A. VOLPE, ET AL.,

Defendants-Appellees

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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I N D E X

C I T A T I O N S

Cases:

* Cases and authorities chiefly relied upon are marked by asterisks.

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ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
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BRIEF FOR THE APPELLEES

COUNTERSTATEMENT OF THE QUESTION PRESENTED *

Whether the Federal Aviation Administrator's "high density" rules constitute a reasonable exercise of the powers conferred upon the Administrator by the Federal Aviation Act of 1958.

COUNTERSTATEMENT OF THE CASE

Plaintiffs -- six individual general aviation pilots and aircraft owners, and an association of general aviation pilots and aircraft owners -- brought this action in the district court to enjoin implementation of the "high density" rules promulgated by the

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* On July 7, 1969, this Court denied plaintiffs' motion for summary reversal.

Federal Aviation Administrator for the purpose of relieving acute problems of congestion at five major airports: Washington National Airport; John F. Kennedy, LaGuardia and Newark Airports, serving New York City; and Chicago's O'Hare Airport. The district court granted the Government's motion for summary judgment and dismissed the action.

The regulatory and factual background of this action are set forth below.

A. Promulgation of the Federal Aviation Administrator's "High Density" Rules

On September 3, 1968, the Acting Administrator of the Federal Aviation Administration (hereafter "Administrator") issued a notice of proposed rulemaking and notice of public hearing with respect to "special air traffic rules and other requirements" to or from certain "high density traffic airports" (33 Fed. Reg. 12580; App. 34-36). 1/ The notice stated that delays had been encountered at many airports, "most critical[ly]" at Washington, New York and Chicago, and that such congestion "frequently requires the imposition of traffic flow restrictions creating backup delays throughout the air transportation system" (App. 34). The notice also stated that, in order to relieve congestion, the Federal Aviation Administration ("FAA") was planning changes in air traffic and airport procedures

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1/ "App." refers to the Joint Appendix, filed with the Clerk of this Court pursuant to Rule 30 of the Federal Rules of Appellate Procedure.

and practices, but that, "despite these improvements, FAA believes that regulatory action must be taken to alleviate congestion," and that, after consulting with industry organizations representing all major segments of aviation, the Administrator was proposing special air traffic rules at five "high density" airports: Washington National Airport; John F. Kennedy, Newark and LaGuardia Airports, serving New York City; and Chicago's O'Hare Airport (App. 34). The notice set forth the substance of the proposed rules, and invited all interested parties to submit comments at a public hearing thereon (App. 34-36).

Public hearings on the proposed "high density" rules were held on September 25, 26, and October 3, 1968 (see App. 50). Representatives of all major segments of the aviation community, including the plaintiff association of general aviation pilots and aircraft owners, appeared at the hearings, and stated their views on the proposed rules (see App. 37, 50-91). In addition, over 3000 separate written comments on the proposed rules were submitted by members of the aviation community and the general public.

On November 27, 1968, the Federal Aviation Administrator issued a notice which designated Washington National, John F. Kennedy, LaGuardia, Newark, and O'Hare Airports as "high density traffic airports" and prescribed special air traffic rules and airport traffic patterns at those airports, effective April 27, 1969 (33 Fed. Reg. 17896; App. 37-39). The notice stated that while "substantial opposition" to the proposed rules had been expressed at the public hearings, associations representing the air carriers, airport

operators and airline pilots had, with certain reservations, favored the proposed rules (App. 37; see also App. 50-90). The notice also stated that "Many citizen groups and others representative of the public viewpoint, such as the leading newspapers in the cities directly concerned, stressed the need for Federal action" (App. 37).

The Administrator's November 27, 1968 notice listed in detail the various objections to the proposed rules, and explained why those objections were not sufficient, in the Administrator's judgment, to preclude adoption of the proposed rules (App. 37-39). Thus, the notice acknowledged that the FAA had already undertaken certain, and was planning additional, measures to relieve congestion -- e.g., permitting "intersection takeoffs"; placing greater reliance on pilots to obtain information without verification by controllers; and adoption of "flow control" procedures (App. 37-38). However, the notice stated, "even with these combined actions, it is obvious that congestion will again reach serious proportions unless additional restraints are placed on aircraft demand for the use of airport facilities" (App. 38). The notice also stated that while "longrun solutions are dependent upon the modernization and expansion of the airways system and airport development," in the meantime, "the public interest in efficient, convenient, and economical air transportation requires more effective use of airport and airspace capacity" (ibid.).

While the Administrator thus rejected the arguments against "high density" rules, he did modify the rules as originally proposed in response to certain criticisms and suggestions expressed at the public hearings (App. 38-39). 2/

Subsequent to the issuance of the "high density" rules, the Administrator received a number of petitions for reconsideration, including one filed by the plaintiff association, a petition for revocation, and many written comments from interested persons requesting changes in the rules (see App. 40, 101). On February 24, 1969, the Administrator issued a further notice stating that all relevant comments had been considered, and that the Administrator had decided to amend the rules in several aspects as suggested by a number of petitions and comments (34 Fed. Reg. 2603; App. 40-41).

The Administrator's February 24, 1969 amendment stated that the FAA had instituted "advanced flow control procedures" on January 15, 1969; that the FAA expected to accomplish, before the end of the calendar year, "a major revamping and improvement of the airway structure and the air traffic control procedures" in the New York Metropolitan area; and that it was never intended that the "high density" rules be considered "the permanent solution to the air congestion problem" (App. 40). Accordingly, the amendment

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2/ E.g., in response to criticisms of general aviation users, the Administrator deleted from his rules provisions that each IFR aircraft operating to or from a "high density" airport must have a minimum flight crew of two pilots and be capable of maintaining an airspeed of 150 knots (App. 39).

continued, the Administrator had decided to adopt the suggestion that the "high density" rules be made "temporary" (ibid.). The notice stated that an expiration date of December 31, 1969 would permit the Administrator to: (1) make "an orderly review of the operation of the rule during the summer months"; (2) "evaluate the effectiveness of the advanced flow control procedures and other actions taken to expedite traffic during that time"; and (3) "consider further rule-making action," if necessary (ibid.).

The Administrator's February 24, 1969 amendment also adopted the suggestion that, "to provide additional time for the adjustment of operations by all users of the airports," the effective date of the rules should be postponed (App. 40). The amendment stated, however, that "it is essential" that the "high density" rules "be in effect by the beginning of the summer increase in operations" at the affected airports (ibid.).[3/] Consequently, the amendment provided that the effective date of the "high density" rules be postponed from April 27, 1969 to June 1, 1969 (ibid.).

In addition to providing that the "high density" rules be temporary, and postponing the effective date of the rules, the Administrator's February 24, 1969 amendment modified the substance of the rules by accepting the suggestion that certain restrictions

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3/ In June, July and August 1968, the five "high density" airports experienced, respectively, 9,925, 20,124 and 15,344 IFR delays of more than 30 minutes (App. 45).

on airport use be eliminated (App. 40). A detailed statement of the substance of the rules, as finally adopted, and presently in operation, is set forth immediately below.

B. The Federal Aviation Administrator's "High Density" Rules

In order to alleviate the problem of acute congestion at five designated "high density" airports (Washington National, John F. Kennedy, LaGuardia, Newark and O'Hare), the Federal Aviation Administrator's "high density" rules provide that landings or takeoffs may be undertaken only if the aircraft operator has a reservation for that operation; 4/ and that, generally, the number of reservations shall be limited to a specified number per hour and allocated only to IFR flights (App. 40-41; 34 Fed. Reg. 2603). 5/ The Administrator's rules establish the following schedule allotting the IFR reservations at the designated airports among three classes of airport users:

(a) air carriers except air taxis; (b) scheduled air taxis; and (c) all others (including general aviation) (App. 41):

4/ No reservation is required for certain aircraft (e.g., STOL (short takeoff and landing), VTOL (vertical takeoff and landing), and helicopters), whose landing and takeoff would not interfere with the operation of other aircraft (App. 37).

5/ When ground visibility is less than three miles or airport ceiling is under 1000 feet, aircraft at FAA controlled facilities must land or take off under "instrument flight rules" (IFR). At other times, aircraft may elect to operate under "visual flight rules" (VFR). See 14 C.F.R. 91.105-91.109 (1969); 14 C.F.R. 91.115-91.129 (1969).

IFR OPERATIONS PER HOUR

Class of user	John F. Kennedy Airport	La Guardia Airport	Newark Airport	O'Hare Airport	Washington National Airport
All carriers except air taxis	70 6/	48	40	115	40
Scheduled air taxis	5	6	10	10	8
Other	5	6	10	10	12

The Administrator explained that the allocation schedule had been arrived at by considering "a number of variable factors including airport ground facilities, weather conditions, noise abatement procedures, aircraft mix, uniformity of flow, runway combinations, and the availability of alternative airports" (App. 34). The Administrator also explained that the rules grant (App. 38):

> * * * a greater priority to certificated air carriers, who provide common carriage service, in accordance with the policy of recognizing the national interest in maintaining a public mass air transportation system, offering service on equal terms to all who would travel. For the traveler today, there is frequently no feasible alternative mode of travel. The concept of "first come-first served" remains as the fundamental policy governing the use of airspace so long as capacity is adequate to meet the demands of all users without unreasonable

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6/ 80 between 5 P.M. and 8 P.M.
Under the rules as originally announced on November 27, 1968, the total number of reservations at John F. Kennedy Airport between 5 P.M. and 8 P.M. was 80, and these reservations were allocated entirely to air carriers except air taxis (App. 38-39). The February 24, 1969 modification increased the total number of hourly reservations at John F. Kennedy Airport between 5 P.M. and 8 P.M. to 90, and the additional 10 reservations were equally allotted among scheduled air taxis and others (including general aviation) (App. 40-41).

> delay or inconvenience. When capacity limitations compel a choice, however, the public service offered by the common carrier must be preferred. This policy is fully consistent with the Federal Aviation Act's provisions relating to the certification of common carriers by the Civil Aeronautics Board, wherein the Board finds that the service provided is required by the public convenience and necessity. 7/

The Administrator's "high density" rules also contain a number of important additional provisions. First, air traffic control officials at the designated airports will grant additional reservations for IFR landings and takeoffs whenever such additional operations can be accommodated without adverse effect on flights with allocated IFR reservations (App. 37). Second, when VFR conditions prevail at the affected airports, which is at least 85 per cent of the time, additional reservations for VFR landings or takeoffs will be granted whenever such operations can be accommodated without adverse effect on flights with allocated IFR reservations (App. 37, 45).

7/ The Administrator also noted that (App. 38):

> the number of allocations specified are in excess of the capacities of the airports to handle IFR traffic in IFR conditions with minimum delays and they were selected with the realization that under IFR weather conditions delays will occur. Permitting some delay appears preferable to restricting the total operations to the actual IFR minimum delay capacity resulting in unused capacity when the weather is above IFR conditions. If experience indicates that the allocations are too high or too low, adjustments will be made.

These additional provisions should principally benefit general aviation since air carriers and scheduled air taxis, which generally operate according to fixed schedules, lack the flexibility of general aviation aircraft (see App. 44). Finally, the Administrator's "high density" rules also authorize extra sections of scheduled air carrier flights at Washington National, LaGuardia, Newark, and O'Hare Airports, without regard to the hourly limitation upon the number of IFR reservations (App. 40). The purpose of this modification was to permit continued operation of the shuttle service between Washington and New York, Washington and Newark, and New York and Boston. The Administrator was persuaded that any additional delay resulting from the extra sections would be more than offset by the benefit to the public of continuing the availability of assured seating without prior passenger reservations between these points (ibid.).

C. District Court Proceedings

On April 11, 1969, plaintiffs -- six individual general aviation pilots and aircraft owners, and an association of general aviation pilots and aircraft owners -- brought this action in the district court against the Secretary of Transportation and the Federal Aviation Administrator to declare unlawful and enjoin the implementation of the Administrator's "high density" rules (App. 5-14). Plaintiffs thereafter filed a motion for a preliminary injunction, and the Government moved to dismiss or alternatively for summary judgment (App. 15-108).

At the hearing on the foregoing motions, plaintiffs conceded that the Federal Aviation Act of 1958 grants the Federal Aviation Administrator "plenary power" to adopt rules bringing about "an efficient use of air space" (App. 122). Plaintiffs further conceded that they found "no fault with the rule-making process as was followed by the Administrator" (App. 125).[8] However, plaintiffs contended, inter alia, that the Administrator's "high density" rules violate certain provisions of the Federal Aviation Act, and that there is no reasonable relationship between the rules and the statutory objective of efficient use of airspace (App. 113, et seq.).

The district court granted the Government's motion for summary judgment and dismissed the action (App. 110). The court ruled that it had jurisdiction to consider plaintiffs' challenge to the Administrator's "high density" rules,[9] but that plaintiffs had failed to show that the Administrator's rules were "arbitrary and capricious" (App. 168). The court stated (App. 168-169):

> It appears to the Court that a very strong presumption of validity exists in a case such as this where concededly no procedural irregularity is present and where, as the Court has determined, no statute has been violated.

8/ The Administrator followed the informal rulemaking procedures under Section 4 of the Administrative Procedure Act, 5 U.S.C. 553 (Supp. IV, 1965-1968).

9/ Accordingly, the court also denied the Government's motion to dismiss (App. 110).

> The rule, on its face, shows that discretion was, in fact, exercised and that the actions taken in promulgating the rule were only after deliberate and careful consideration. We are here in a field involving peculiarly the expertise of the Agency, that is to say the Administrator, i[n] a highly technical and difficult area where matters of judgment necessarily weigh very heavily.
>
> It appears to the Court that there is a rational basis for the action that has been taken, that this is the test under such analogous cases as Citizens Band in 375 Fed. 2d, 10/ and American Airlines, in 123 U.S. App. D.C., 11/ and that there has been a wholly insufficient showing in the light of the procedural regularity and the failure to demonstrate any statutory violation to challenge the action of the Administrator as arbitrary and capricious [Emphasis added].

In rejecting plaintiffs' claim that they were entitled to a "hearing" or trial de novo in the district court to evaluate the merits of the Administrator's rules, the court stated (App. 169-170):

> The Court has determined that that would be an inappropriate course to follow, not because there might not be some further indications as to the effect and significance of the rules and regulations, but because of the nature of the challenge that we have here.
>
> It is not for the Court to substitute its discretion for that of the Administrator. It is only for the Court to be satisfied that the Administrator, in fact, has exercised his discretion in a competent, deliberate and intelligent manner, which the Court finds he has.

10/ California Citizens Band Ass'n. v. United States, 375 F. 2d 43 (C.A. 9, 1967), certiorari denied, 389 U.S. 844.

11/ American Airlines, Inc. v. Civil Aeronautics Board, 123 U.S. App. D.C. 310, 359 F. 2d 624 (1966) (en banc), certiorari denied, 385 U.S. 843.

> To embark on a hearing would be to transfer the function of rule-making powers delegated to the Administrator by the Congress, to this court-room where the Court would become involved in a regurgitation and a re-examination of all of the materials that led the Administrator to exercise his discretion.
>
> This is not what the law requires and it seems appropriate, therefore, being satisfied that the discretion has been lawfully and properly exercised to grant the Government's motion for summary judgment, which the Court now does [Emphasis added]. 12/

STATUTE INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 49 U.S.C. 1301, et seq., are set forth infra, pp. 1a-2a.

12/ Since the district court granted the Government's motion for summary judgment and dismissed the action, the court also dismissed as moot plaintiffs' motion for a preliminary injunction (App. 110). The court noted, however, that "no preliminary injunction should be issued as a matter of the Court's discretion," since the Administrator's rules were designed "to meet a critical upcoming situation which will be effective as to only five airports for a limited period and for a limited period of operations," while, on the other hand, "there is a dominant public interest in dealing with this critical serious congestion problem which is the focus of the rule" (App. 167-168).

In National Business Aircraft Ass'n., Inc. v. Volpe, C.A.D.C. No. 22636, decided April 22, 1969, this Court dismissed, for lack of jurisdiction, a previous action by another plaintiff (NBAA) to review the Federal Aviation Administrator's "high density" rules. NBAA then brought another action, in the district court (Civ. Action No. 1228-69), which was dismissed on the Government's motion for summary judgment on July 10, 1969. NBAA filed a notice of appeal in that action on August 5, 1969.

SUMMARY OF ARGUMENT

There is no substance in plaintiffs' contention that the district court should have conducted a "hearing" or trial de novo to evaluate the merits of the Administrator's "high density" rules. For, as the district court stated, this would transfer the rule-making powers delegated to the Administrator by the Congress, to the courtroom "where the Court would become involved in a regurgitation and a re-examination of all of the materials that led the Administrator to exercise his discretion" (App. 170).

Where, as in the instant case, an administrative agency adopts rules after informal rulemaking proceedings, the sole judicial function is to ascertain that "the result is reasonable and within the range of authority conveyed, that it has been formulated in the manner prescribed, and that the disappointed have had the opportunity provided by Congress to try to make their views prevail." Automotive Parts & Accessories Ass'n. v. Boyd, ____ U.S. App. D.C. ____, 407 F. 2d 330, 343 (1968). These tests have clearly been satisfied here. For plaintiffs conceded in the district court that the Federal Aviation Act of 1958 vests in the Administrator "plenary power" to adopt rules bringing about "an efficient use of air space," and that there is "no fault with the rule-making process as was followed by the Administrator" (App. 122, 125). And it is equally clear that, in seeking to reduce severe airport congestion by reducing demand at five major "high density" airports, the Administrator's rules constitute a reasonable exercise by the Administrator of his broad statutory authority to "assign * * * the

use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure * * * the efficient utilization of such airspace." 49 U.S.C. 1348(a).

ARGUMENT

THE FEDERAL AVIATION ADMINISTRATOR'S "HIGH DENSITY" RULES CONSTITUTE A REASONABLE EXERCISE OF THE POWERS CONFERRED UPON THE ADMINISTRATOR BY THE FEDERAL AVIATION ACT OF 1958.

A. Plaintiffs' principal argument on this appeal (Brief for Appellants, pp. 11, et seq.) seems to be that the district court should have conducted a "hearing" or trial de novo to evaluate the merits of the Administrator's "high density" rules. The district court rejected this contention, pointing out that plaintiffs were seeking "to transfer the function of rule-making powers delegated to the Administrator by the Congress, to this courtroom where the Court would become involved in a regurgitation and a re-examination of all of the materials that led the Administrator to exercise his discretion" (App. 170). The district court's rejection of plaintiffs' argument is well supported, indeed mandated, by settled principles of administrative law, and a long line of judicial decisions.

For example, in National Broadcasting Co. v. United States, 47 F. Supp. 940 (S.D. N.Y., 1942)(three-judge court), affirmed, 319 U.S. 190 (1943), Judge Learned Hand refused to conduct a "hearing" to evaluate the merits of regulations adopted by the Federal Communications Commission, pointing out that if the evidence adduced at the hearing:

> were to contradict or overthrow the findings [of the Commission], we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole, underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it [47 F. Supp. at 947; emphasis added].

In affirming, the Supreme Court held (319 U.S. at 227):

> The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial de novo of the matters heard by the Commission and dealt with in its Report would have been improper. See Tagg Bros. v. United States, 280 U.S. 420; Acker v. United States, 298 U.S. 426.

See, also, Chicago Mercantile Exch. v. Tieken, 177 F. Supp. 660, 665 (N.D. Ill., 1959) (three-judge court), where Circuit Judge Hastings stated that "in reviewing administrative findings, courts do not take additional evidence," and that:

> To go beyond a legislative record which provides a rational basis for an enactment and to take evidence for the purpose of reassessing the legislative resolution of "conflicting values" and "competing worths" would amount to a usurpation by this court of the legislative function.

And see United States v. Bianchi & Co., 373 U.S. 709, 714-715 (1963) (courts may not conduct de novo proceedings to review the validity of administrative action); Pacific States Co. v. White, 296 U.S. 176, 184-186 (1935) (an administrative order in the nature

of "general legislation" must be sustained "if any state of facts reasonably can be conceived that would sustain it * * *").[13/]

As just seen, there is no substance in plaintiffs' contention that the district court should have conducted a "hearing" or trial de novo to evaluate the merits of the Administrator's "high density" rules. Where, as in the instant case, an administrative agency adopts rules after informal rulemaking proceedings, the sole judicial function is to ascertain that "the result is reasonable and within the range of authority conveyed, that it has been formulated in the manner prescribed, and that the disappointed have had the opportunity provided by Congress to try to make their views prevail." Automotive Parts & Accessories Ass'n. v. Boyd, ____ U.S. App. D.C. ____, 407 F. 2d 330, 343 (1968). Stated otherwise, the scope of judicial review of an agency's exercise of essentially "legislative power" through issuance of rules after appropriate informal rulemaking proceedings, is not the "substantial evidence" test applicable to review of individual adjudication at a trial-type hearing; rather, the judicial function is simply to ascertain whether the rules have "a rational basis." See American

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13/ See, also, 6 Moore's Federal Practice, ¶56.17[3], p. 2472 (1966):

> * * * in an action to enjoin the enforcement or otherwise obtain review of an administrative order where the plaintiff has no right to a trial de novo, but is limited to the record before the agency and this record is before the court, the case is ripe for summary disposition, for whether the record is supported by sufficient evidence, under the applicable statutory standard, or is otherwise legally assailable, involve matters of law.

Airlines, Inc. v. Civil Aeronautics Board, 123 U.S. App. D.C. 310, 314-316, 359 F. 2d 624, 627-630 (1966) (en banc) certiorari denied, 385 U.S. 843; California Citizens Band Ass'n. v. United States, 375 F.2d 43, 54 (C.A. 9, 1967), certiorari denied, 389 U.S. 844; Boating Industry Ass'n. v. Boyd, 409 F. 2d 408, 411 (C.A. 7, 1969); Borden Co. v. Freeman, 369 F. 2d 404 (C.A. 3, 1966), affirming on the opinion below, 256 F. Supp. 592, 600-602 (D. N.J.), certiorari denied, 386 U.S. 992; Air Line Pilots Ass'n. Intern. v. Quesada, 276 F. 2d 892, 898 (C.A. 2, 1960) (Lumbard, Ch. J.); 1 Davis, Administrative Law, § 5.03, p. 299 (1958).

In the instant case, plaintiffs conceded in the district court that the Federal Aviation Act of 1958 vests in the Administrator "plenary power" to adopt rules bringing about "an efficient use of air space," and that there is "no fault with the rule-making process as was followed by the Administrator" (App. 122, 125). We show below that the Administrator's "high density" rules constitute a reasonable exercise of the broad statutory powers conferred upon the Administrator by the 1958 Act. Consequently, under the settled principles stated above, the district court properly rejected plaintiffs' attack upon those rules.

B. Section 307(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1348(a), confers upon the Federal Aviation Administrator broad authority to:

> develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. * * * 14/

The Senate Committee on Interstate and Foreign Commerce emphasized that Section 307(a), the "heart" of the Act, vests "plenary" and "unquestionable authority for all aspects of air space management" in the Administrator in order to make "possible a truly safe and effective airspace regime." S. Rept. No. 1811, 85th Cong., 2d Sess., pp. 14-15 (1958).

In seeking to reduce severe airport congestion by reducing demand at five major "high density" airports, the Administrator's rules clearly constitute a reasonable exercise by the Administrator of his broad statutory authority to "assign * * * the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure * * * the efficient utilization of such airspace." 49 U.S.C. 1348(a).

14/ Section 6(c)(1) of the Department of Transportation Act, 80 Stat. 938 (1966), 49 U.S.C. 1655 (c)(1) (Supp. IV, 1965-1968), transferred the functions, powers and duties of the Federal Aviation Administrator under the Federal Aviation Act of 1958 to the Secretary of Transportation. Subsequently, pursuant to the Department of Transportation Act, the Secretary of Transportation delegated his functions under the Federal Aviation Act of 1958 to the Federal Aviation Administrator. 32 Fed. Reg. 5607.

From 1964 to 1968 the number of itinerant aircraft operations at FAA facilities increased from 21.6 million to 32.4 million; the projected total for 1969 is 35.7 million (App. 44). The failure of airport expansion to keep pace with the increase in aircraft operations has caused serious airspace congestion at a number of airports. Airspace congestion, in turn, results in substantial delays in takeoffs and landings; in the latter case, aircraft are often required to circle airports in holding patterns until they can be accommodated by the limited operational capacity of the airport (see App. 34, 46-49). The congestion problem is most acute at the five designated "high density" airports (Washington National, John F. Kennedy, LaGuardia, Newark and O'Hare); indeed, in the year ended March 1969, 84.1% of all aircraft delays greater than 30 minutes occurred at those airports (App. 46).

The air carrier fleet, comprising 2452 aircraft, flew over 100 billion passenger miles in 6 million hours in 1967. General aviation, comprising 114,186 aircraft, flew 3.4 billion miles in 22.2 million hours in 1967 (App. 18, 43).[15/] The Federal Aviation Administrator's "high density" rules, by granting a priority in IFR reservations to air carriers (supra, pp. 7-10), clearly promote the "efficient utilization" of the congested airspace at the affected airports; for the necessary effect of

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15/ See also FAA Statistical Handbook of Aviation, 1968 edition, pp. 167, 170.

the rules is to permit a greater number of people to be transported through a given amount of airspace in a given period of time.[16]

The reasonableness of the Administrator's rules is further demonstrated by the facts as to the relative flexibility of the different classes of users. Commercial air carriers and scheduled air taxis generally operate on fixed schedules, and consequently have little choice as to where they can take off or land (see App. 44). Further, the "high density" airports in New York City and Chicago were designed to accommodate the bulk of commercial passenger service in those cities, and these passenger flights simply have no adequate alternative facilities available. In contrast, general aviation generally does not fly on fixed schedules; and most general aviation aircraft can use any of the numerous alternative facilities available to them in the Washington, New York City and Chicago areas (App. 44-45).[17]

16/ In reducing the number of aircraft which must circle over the affected airports, the rules also promote the "efficient utilization" of the navigable airspace.

17/ FAA controlled facilities available for use by general aviation include: (1) Dulles and Friendship Airports in the Washington area; (2) Teterboro, Morristown, MacArthur and Westchester in the New York City area; and (3) Midway, Meigs, Palwaukee and DuPage Airports in Chicago. Moreover, in each area, there are numerous other non-FAA controlled airports which can, and do, accommodate the majority of the general aviation fleet (App. 45).

The Administrator's rules, of course, inconvenience all classes of airport users. But it was not unreasonable for the Administrator to conclude that the inconvenience suffered by general aviation in diverting its aircraft to alternative facilities is no greater than the inconvenience suffered by the commercial air lines, which provide the bulk of the air passenger service available to the general public, and for which no alternative facilities are available.[18] Indeed, as the Administrator has pointed out, there is no assurance that "the prospective detriment or inconvenience" to general aviation under the rules "would not be suffered by plaintiffs to an even greater extent by the delays which may occur if the rule is enjoined" (App. 49). In any event, plaintiffs' disagreement with the wisdom, expediency and desirability of the Administrator's rules does not, of course, constitute a basis for invalidating them. Nor does the Administrator's reasonable classification of the different classes of aircraft violate "the due process clause of the Fifth Amendment * * *" (Brief for Appellants, p. 17). See, e.g., Udall v. Washington, Virginia & Md. Coach Co.,

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18/ The Administrator also pointed out that "the utilization, proportionately, at the subject airports, available to plaintiffs upon implementation of the rule will not be substantially different than the use, by plaintiffs, prior to the implementation; nor will the result of allocations or limitations upon their utilization be significantly different, if at all, than the result of allocations or limitations upon air carriers * * *" (App. 43).

___ U.S. App. D.C. ___, 398 F.2d 765 (1968), certiorari denied, 393 U.S. 1017.[19]

C. There is no substance to any of plaintiffs' remaining contentions.

Plaintiffs contend (Brief for Appellants, pp. 13-14) that the Administrator's "high density" rules violate the provision of 49 U.S.C. 1349(a), that "There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."[20] It is clear, however, that the Administrator's rules do not assign exclusive use of any airport to any class of airport users. Every class of users, including general aviation aircraft, is allocated a number of IFR

19/Judge Wright held (398 F.2d at 769):

> * * * there is a judicial presumption of validity of administrative action, and the burden is on WV&M [the plaintiff] to overcome that presumption * * *. The court should not seek to make a de novo determination, and it need not agree with the Secretary's judgment in order to uphold it. For where there is more than one solution to an administrative problem the court will uphold any one that has a rational basis. * * * Here the task of weighing the competing uses of federal property has been delegated by Congress to the Secretary of the Interior. The balance which he strikes will not be judicially upset unless it is arbitrary or beyond his authority. * * * "Error or unwisdom is not equivalent to abuse." * * * Where administrative control has been congressionally authorized, the judicial function is exhausted once there is found some "rational basis" for the action taken. * * * [citations omitted].

See, also, Air Line Pilots Ass'n. Inter. v. Quesada, supra, 276 F.2d at 898; Flying Tiger Line, Inc. v. Boyd, 244 F.Supp. 889, 892 (D.D.C. 1965)("It hardly needs discussion beyond a mere mention that reasonable classification does not constitute illegal discrimination"); McCarey v. McNamara, 390 F.2d 601 (C.A. 3, 1968); Wickard v. Filburn, 317 U.S. 111, 129-130 (1942).

20/Plaintiffs also claimed, in the district court, that the Administrator's rules violate several other sections of the (Continued on next page).

operations each hour at the affected airports (see supra, pp. 7-10 [21]). Moreover, even if the rules had sought to avoid severe airport congestion by excluding certain aircraft from IFR airport use for a limited number of hours,[22] there would still be no violation of 49 U.S.C. 1349(a). For the purpose of that section was simply to "to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in

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20/cont'd

Federal Aviation Act (see App. 9). Since the Brief for Appellants does not refer to these additional sections, we deem those additional contentions to be abandoned on appeal, and do not treat them in this brief. (Plaintiffs' additional claims were refuted at pages 12-14 of the memorandum of law filed by the Government in the district court.)

21/ Plaintiffs conceded below that the Administrator's rules do not, on their face, grant an exclusive use to any class of airport users (App. 126). Plaintiffs' sole contention seems to be that general aviation pilots and owners would feel themselves so inconvenienced by the Administrator's rules that they would voluntarily choose to abandon all use of the affected airports.

22/ As noted below, because of the heavy international traffic at John F. Kennedy Airport between 5 P.M. and 8 P.M., the Administrator's rules, as originally adopted, limited reservations at that airport during those hours to scheduled air carriers (see App. 38-39). However, the February 24, 1969 amendment eliminated this restriction (App. 40-41).

civil aeronautics in accordance with the policy of the act * * *." 40 Op. Atty. Gen. 71, 72 (1941)(Attorney General Jackson).[23/]

There is also no substance in plaintiffs' contention that the Administrator's "high density" rules are invalid because "promulgated in the face of an official record of overwhelming opposition of the aviation community and others * * *" (Brief for Appellants, p. 15). In the first place, while there was indeed "substantial opposition" to the proposed "high density" rules, as the Administrator noted, associations representing air carriers, airport operators and airline pilots, with certain reservations, favored the proposed rules; and "Many citizen groups and others representative of the public viewpoint, such as the leading newspapers in the cities directly concerned, stressed the need for Federal action" (App. 37). Moreover, even unanimous opposition by the aviation industry would not have invalidated

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23/ 49 U.S.C. 1349(a) is virtually identical to Section 303 of the Civil Aeronautics Act of 1938, to which the Attorney General's Opinion was specifically directed.

Attorney General Jackson also pointed out that Section 303 does not prohibit the Administrator from preventing "such competition as would endanger the safety of the public and of persons engaged in air commerce." 40 Op. Atty. Gen., at 73. Similarly, 49 U.S.C. 1349(a) should not be interpreted to prevent the Administrator from fulfilling his statutory responsibility, under 49 U.S.C. 1348(a), to provide for "the efficient utilization" of the navigable airspace.

the Administrator's rules. An administrative regulation in the public interest is not subject to a veto because of the special interest of a group covered by that regulation.

In the instant case, all segments of the aviation community, including the plaintiff association of general aviation pilots and aircraft owners, were afforded a complete opportunity to, and did, present their views on the proposed "high density" rules (supra, pp. 2-7). The Administrator carefully considered all of the objections to the "high density" rules -- the same contentions renewed by plaintiffs in the district court and on this appeal (cf. App. 37,with App. 8-10, 22-30). Indeed, plaintiffs themselves have conceded that there was "no fault with the rule-making process as was followed by the Administrator" (App. 125). In short, the "high density" rules, which the Administrator promulgated "after deliberate and careful" consideration(App. 168), satisfied all of the accepted tests of informal rulemaking -- that "the result is reasonable and within the range of authority conveyed, that it has been formulated in the manner prescribed, and that the disappointed have had the opportunity provided by Congress to try to make their views prevail. " Automotive Parts & Accessories Ass'n.v. Boyd, supra, 407 F.2d at 343 (C.A.D.C.). See, also, American Airlines,Inc. v. Civil Aeronautics Board, supra, 359 F.2d at 629-630 (C.A.D.C.), and cases cited supra, p. 18.

Finally, plaintiffs object to the fact that the Administrator's "high density" rules modify the Administrator's prior policy of

"first come-first served" (Brief for Appellants, pp.16-17).[24/]

But the short answer to this objection is underscored in this Court's opinion in New Castle County Airport Comm'n.v. C.A.B., 125 U.S. App. D.C. 268, 270, 371 F.2d 733, 735 (1966), certiorari denied, 387 U.S. 930:

> An administrative agency concerned with the furtherance of the public interest is not bound to rigid adherence to precedent. It may switch rather than fight the lessons of experience.

Accord: Pinellas Broadcasting Co. v. FCC, 97 U.S. App. D.C. 236, 238, 230 F.2d 204, 206 (1956), certiorari denied, 350 U.S. 1007 ("[T]he Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes"); American Trucking v. A.,T. & S.F.R.Co., 387 U.S. 397 (1967).[25/]

24/ The Administrator stated (App. 38):

> The concept of "first-come-first served" remains as the fundamental policy governing the use of airspace so long as capacity is adequate to meet the demands of all users without unreasonable delay or inconvenience. When capacity limitations compel a choice, however, the public service offered by the common carrier must be preferred. This policy is fully consistent with the Federal Aviation Act's provisions relating to the certification of common carriers by the Civil Aeronautics Board, wherein the Board finds that the service provided is required by the public convenience and necessity.

25/ The Court held that (387 U.S. at 416):

> * * * the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. * * * In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of
(Continued on next page).

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

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AUGUST 1969.

25/ Cont'd

flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

STATUTORY APPENDIX

STATUTORY APPENDIX

The Federal Aviation Act of 1958, 49 U.S.C. 1301, et seq., provides in pertinent part:

49 U.S.C. 1348. Airspace control and facilities.

(a) Use of airspace.

The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

(b) Air navigation facilities.

The Administrator is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

(c) Air traffic rules.

The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight, and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

* * * * *

49 U.S.C. 1349. Expenditure of Federal funds for certain airports and air navigation facilities; location of airports, landing areas, and missile and rocket sites.

(a) No federal funds, other than those expended under this chapter, shall be expended, other than for military purposes (whether or not in cooperation with State or other local governmental agencies), for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense. Any interested person may apply to the Administrator, under regulations prescribed by him, for such recommendation and certification with respect to any landing area or air navigation facility proposed to be established, constructed, altered, repaired, maintained, or operated by, or in the interests of, such person. There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.

* * * * *

3-1

No. 23146

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AIRCRAFT OWNERS AND PILOTS ASSOCIATION
J. B. HARTRANFT, JR.,
MAX KARANT,
FRANK K. SMITH,
WALTER HELMER,
STANLEY J. LYNN,
MERRITT WHITE,

On behalf of themselves and all
others similarly situated,

Appellants

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION
U. S. DEPARTMENT OF TRANSPORTATION,

and

JOHN H. SHAFFER, ADMINISTRATOR
FEDERAL AVIATION ADMINISTRATION,

Appellees

REPLY BRIEF FOR APPELLANTS

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TABLE OF AUTHORITIES

* Cases and authorities chiefly relied upon.

STATEMENT OF ISSUE

Whether the plaintiffs seek a trial de novo or merely seek judicial review of the questioned rule within the scope specified in the Administrative Procedure Act.

ARGUMENT

THE PLAINTIFFS DO NOT SEEK A TRIAL DE NOVO BUT MERELY SEEK JUDICIAL REVIEW OF THE QUESTIONED RULE WITHIN THE SCOPE SPECIFIED IN THE ADMINISTRATIVE PROCEDURE ACT.

The Government has misconceived the argument of the plaintiffs on this appeal and has oversimplified the Court's duty with respect to conducting judicial review of the challenged rules. It is true that plaintiffs seek a trial, but the trial or "hearing" which plaintiffs seek is not a "trial de novo to evaluate the merits of the Administrator's high density rules" as contended by the Government (Brief for Appellees, p.14). Nor are plaintiffs seeking to transfer the function of rulemaking powers to the Court, as contended by the Government (Brief for Appellees, p.14, 15). Plaintiffs, rather, seek a trial to prove the allegations of their complaint, which they are entitled to do under the Administrative Procedure Act if there are justiciable issues of fact. Plaintiffs' complaint seeks judicial review of a Federal Aviation Regulation which adversely affects and aggrieves the plaintiffs and the class of over one-half million general aviation aircraft

owners and pilots which the plaintiffs represent.

The Administrative Procedure Act[1] gives to the plaintiffs the right of judicial review of this regulation and very specifically sets forth the form and scope of such review. It specifically authorizes review by way of an action for declaratory judgment and injunction in a court of competent jurisdiction, as was brought by plaintiffs herein. And it specifically states under "scope of review" that,

> "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B)contrary to constitutional right, power, privilege, or immunity;
> (C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . .
> (F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[2]

Plaintiffs have alleged in detail in their complaint why the agency action is arbitrary, capricious, an abuse of discretion, contrary to the Constitution, in excess of statutory authority, and unwarranted by the facts. Plaintiffs seek an opportunity to prove these contentions (J.A. pp.8-10).

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[1] Section 10(b) of the Administrative Procedure Act, 5 U.S.C. 553, 80 Stat. 381 (1966) (Relevant statutory provisions are set out in the statutory appendix to this brief).

[2] Id. at Section 10(e).

The Government makes much of the fact that the challenged rule was adopted under authority of Section 307(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1348(a), which vests "plenary power" in the Administrator to adopt rules for the efficient utilization of navigable airspace. The Government seems to equate "plenary" with "unreviewable by the courts." This is not consonant with the law. The Administrative Procedure Act very clearly makes agency action judicially reviewable, whether or not such action is taken pursuant to a "plenary" statute. There are limits to this "plenary" authority. The Federal Aviation Act itself in Section 307(d), 49 U.S.C. 1348(d), provides that,

> "In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the Administrator shall be subject to the provisions of the Administrative Procedure Act, notwithstanding any exception relating to military or naval functions in section 4 thereof."

The limits of the Administrator's plenary authority are set by the Administrative Procedure Act.

The Government cites a series of cases to support its contention that the plaintiffs are not entitled to a hearing or trial. The cases cited by the Government are clearly

distinguishable from the instant case in that the Government's cases deal with either judicial review after an evidentiary hearing (which has not been had in the instant case), legislative rather than administrative action, or with fact patterns arising prior to the effectiveness of the Administrative Procedure Act.

After arguing that plaintiffs are not entitled to a trial or hearing, the Government goes on to concede that the courts do have some role in administrative review. Citing Automotive Parts & Accessories Ass'n v. Boyd, ____U.S. App. D.C. ____, 407 F.2d 330, 343 (1968), the Government states that it is the "judicial function to ascertain that the result is reasonable and within the range of authority conveyed" (Brief for Appellees, p.17). The plaintiffs agree that this is the judicial function; indeed, they seek its proper exercise.

Plaintiffs maintain that this function was not properly exercised by granting summary judgment to the Government because summary judgment was granted while there were yet genuine issues of material fact to be litigated. Plaintiffs have addressed themselves to this issue in their Brief in chief. It would not be appropriate to reargue that issue in

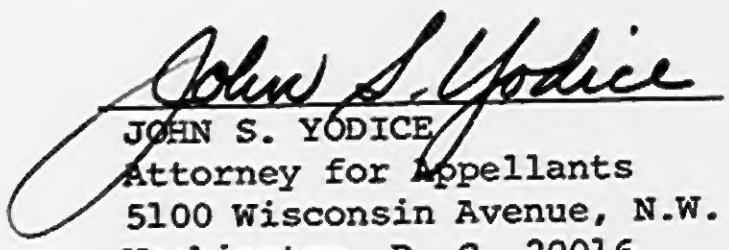
this reply brief. Suffice it to say that the issue on appeal is not, as the Government sees it, whether the Administrator's "high density rules" constitute a reasonable exercise of the powers conferred upon the Administrator by the Federal Aviation Act of 1958. Rather, the issue is whether the Court erred in reaching such a determination while factual issues remained yet unlitigated. In its brief, the Government has curiously avoided a discussion of whether genuine issues exist to be litigated. Nor does the Government respond to plaintiffs' argument that summary judgment is especially improper where a case, as herein, involves public, complex, highly technical, or constitutional issues (Brief for Appellants, p.18-19).

Justiciable issues of material fact still exist. To this point in time, there has not been an evidentiary hearing held on any level, judicial or administrative. If the right of judicial review of administrative action granted in the Administrative Procedure Act is to have any substance, surely a regulation which so adversely affects so many people ought to be subject to scrutiny at some level.

CONCLUSION

For the reasons stated, the plaintiff-appellants respectfully pray that the grant of summary judgment to the Government be reversed and that the case be remanded to the United States District Court for the District of Columbia for further proceedings.

Respectfully submitted,



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STATUTORY APPENDIX

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The Administrative Procedure Act, 5 U.S.C. §553, 80 Stat. 381 (1966), provides in pertinent part:

Section 10(b) Form and Venue of Action

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Section 10(e) Scope of Review

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A)compel agency action unlawfully withheld or unreasonably delayed; and (B)hold unlawful and set aside agency action, findings, and conclusions found to be (1)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2)contrary to constitutional right, power, privilege, or immunity; (3)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4)without observance of procedure required by law; (5)unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or

(6)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.